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No. 06-

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.* PATRICIA HAIGHT and IN DEFENSE OF ANIMALS,
Cross-Petitioner,

v.

CATHOLIC HEALTHCARE WEST; CATHOLIC HEALTHCARE WEST ARIZONA, and MICHAEL BERENS,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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October 2006

QUESTION PRESENTED

Is a *qui tam* action "based upon" a public disclosure in a specified forum, under the statutory bar of the False Claims Act, 31 U.S.C. §3730(e)(4), when the relator derives knowledge of the allegations or transactions from an independent investigation and not from the disclosure?

PARTIES

Qui tam cross-petitioners are Patricia Haight and In Defense of Animals, who bring this action in the name of, and on behalf of, the United States of American. Cross-respondents are Catholic Healthcare West, Catholic Healthcare West Arizona, and Michael Berens.

RULE 29.6 STATEMENT

In Defense of Animals is a not-for-profit entity. It has no parent corporation or publicly held company owning ten percent or more of its stock.

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CONDITIONAL CROSS-PETITION

If a writ is granted on the issue presented in the petition, cross-petitioners request that the Court also consider the following question:

> Is a *qui tam* action "based upon" a public disclosure in a specified forum, under the statutory bar of the False Claims Act, 31 U.S.C. §3730(e)(4), when the relator derives knowledge of the allegations or transactions from an independent investigation and not from the disclosure?

OPINIONS BELOW

The decision of the court of appeals is reported at 445 F.3d 1147 and was reproduced at pages 1-19 of the appendix to the petition. The order of the court denying a petition for rehearing *en banc* by the petitioner is unreported and was reproduced at page 25 of the appendix to the petition. The decision of the district court is unreported and was reproduced at pages 20-24 of the appendix to the petition.

JURISDICTION

Judgment on the court of appeal's decision was entered April 19, 2006. Petitioner filed for rehearing *en banc*, which was denied on May 30, 2006. Cross-petitioners rely on Rule 12.5. Petitioner filed for a writ of certiorari on August 25, 2006, which was docketed on that date (Case No. 06-282). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

31 U.S.C. §3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

1. This case involves a statutory bar of the False Claims Act (""FCA"), 31 U.S.C. §§3729-33, designed to prohibit parasitic *qui tam* actions. *Qui tam* actions are brought by relators in the name of, and on behalf of, the United States. As defined in the 1986 FCA amendments, §3730(e)(4), a parasitic *qui tam* action is one which is based upon the public disclosure of the allegations of false claims in one of the specified fora, unless the United States government intervenes or the relator is "an original source" of the information upon which the allegations are based.

Relators here are Dr. Patricia Haight and the animal welfare advocacy organization – In Defense of Animals – for which she is Southwest Regional Director. Defendants, petitioners and cross-respondents are Dr. Michael Berens and the private research institutions which employ him. In their *qui tam* action, filed under §3730(b), relators alleged that defendants submitted a false and fraudulent grant application to National Institutes of Health (NIH) in order to secure federal funds in violation of §3729 of the FCA.

There is no dispute that relators based this *qui tam* action on their own extensive investigation into the conduct of defendants' research project. Part of that investigation included obtaining a copy of the NIH grant application through a request under the Freedom of Information Act ("FOIA"). But the grant application contained only the false representations defendants made to NIH, not the information showing those representations to be false. Dr. Haight derived her knowledge of their falsity through her own direct and independent investigation. It was only after she sifted through hundreds of animal care records, reviewed extensive minutes of Institutional Animal Care and Use Committee meetings, toured specific animal facilities, and interviewed veterinarians, graduate students, consultants and other witnesses, that relator derived information showing the statements in the grant application were false (App. 17).

In the courts below, defendants sought dismissal under §3730(e)(4), claiming disclosure of the grant application to relator pursuant to her FOIA request triggered the bar. Rejecting that contention, the Ninth Circuit held the FOIA production in this case – turning over a copy of the grant application – was not in one of the specified fora of the FCA, and thus the bar was not invoked. On whether a FOIA production alone must always trigger the parasitic *qui tam* action bar, defendants have petitioned for a writ of certiorari.

In the event that the Court grants the writ on the question submitted, relators ask that it also address the question presented in this conditional cross-petition, concerning the meaning of "based upon." Resolution of the original question presented – whether turning over a copy of the NIH grant application pursuant to FOIA is a public disclosure in a specified fora – would still leave open the question of whether relators based their *qui tam* action on allegations of fraud contained therein. A FOIA production would not, by itself, invoke the parasitic *qui tam* bar, unless relators derived their knowledge of the falsity of the statements from that disclosure. If the "based upon" language of the FCA bar requires an inquiry into the origin of the relator's knowledge, the bar is inapplicable here since Dr. Haight did not derive her knowledge of the falsity of defendants' statements from the NIH grant application. Instead it was the information she learned through her extensive pre-filing investigation that formed the foundation of her allegations that defendants had misrepresented the truth.

2. Known originally as "Lincoln's Law," the FCA was passed during the Civil War in order to help recover government funds lost through fraud and waste. In its initial form, it contained *qui tam*[1] provisions authorizing private persons to enforce the statute's proscriptions, without limitation as to who could serve as relator. In 1943, the Supreme Court permitted recovery by a *qui tam* relator who merely filed a civil FCA action based upon a copy of a criminal indictment that had already been filed by the government. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). Seen as an example of

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[1]The phrase "qui tam" is a shortened version of the Latin phrase *qui tam pro domino rege, quam pro se ipso in hac parte sequitur,* meaning "who prosecutes this suit as well for the king, as for himself." 2 William Blackstone, *Commentaries* 161.

a parasitic lawsuit – one where the relator derived knowledge of the allegations of fraud through the government's own labor – Congress that year acted to correct the problem in *Hess* with an express statutory bar. Congress added the FCA's first version, formerly codified at 31 U.S.C. §232(C), precluding actions that were "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

Courts interpreted the 1943 bar to apply only when

> the evidence and information in possession of the United States ... was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute. *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978).

The problem with the 1943 version of the bar was that it went too far, foreclosing operation of the important *qui tam* enforcement provisions whenever the government possessed "knowledge" about the fraud. Even when the government had such information, officials might determine for lack of resources or political will not to seek remedies. Moreover, in applying the 1943 law, courts relied upon the "government knowledge" bar to deny jurisdiction even when it was clear the relator was not a "parasite" – for example when the government had gained information relating to alleged false claims through the relator *See United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) (Wisconsin not permitted to maintain *qui tam* suit because the federal government already had learned of the information when the state reported it).

In 1986, in the midst of increasing concern over fraud on the government and the amount of federal resources required to combat it, Congress amended the FCA's bar on parasitic suits.

In the 1986 version of the bar, Congress sought to overturn the federal courts' "severely restrictive interpretations." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Importantly, the 1986 amendments fundamentally altered the underlying assumption of the 1943 law: that the *qui tam* provisions were designed to assist the government only when it did not know of the fraud. Instead, the 1986 *qui tam* provisions eliminated the "government knowledge" bar, and put in its place another which expressly authorized relators to enforce the FCA, even in those cases where government knows of the fraud and chooses not to pursue it under the FCA.

> [I]n passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." ... S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct.

United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519 (9th Cir. 1995) (citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).

Seen in this historical context, the clear intention behind the1986 FCA amendments was to craft a narrow rule designed to exclude only truly parasitic *qui tam* actions. It did this by expressly limiting the circumstances when the bar could be invoked to only those actions like *Marcus v. Hess* – where the public disclosure of a government investigation proves to be the basis for the relator's allegations. And to protect any *qui tam*

relator who was "an original source" of information to the government, such an in the *Wisconsin v. Dean* case, Congress created an exception to the bar: A relator may base a *qui tam* action on the public disclosure of the government's investigation, so long as the relator provided the government with information related to the allegations based upon direct and independent knowledge of the information. *See* §3730(e)(4)(B).

That Congress had the 1943 case of *Hess* in mind when it amended the bar in 1986 is made clear by the fact that *each* of the four elements in *Hess* were made express requirements:

> (1) The action must be "based upon" the disclosure; as occurred in *Hess* when the relator derived his knowledge from the filing of the criminal indictment.
>
> (2) The disclosure must be "public"; as occurred in *Hess* when the criminal indictment was placed in the court's open files.
>
> (3) The content of the disclosure must be of the "allegations or transactions" of the fraud or false claims; as occurred in *Hess* when the information in the indictment expressly stated the fraud.
>
> (4) The medium of the disclosure must be one of the specified fora; as occurred in *Hess* when a pleading was filed in connection with a federal investigation and criminal hearing.

All four these elements were present in *Hess* and were made express in the FCA. Absence of any one means the jurisdictional bar does not come into play.

Employing different language in a distinct statutory bar, Congress retained a prohibition of *qui tam* actions based upon government knowledge, when the action is brought against certain government officials. *See* §3730(e)(2)(A) ("No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official *if the action is based on evidence or information known to the Government* when the action was brought") (emphasis supplied). Congress also employed different language in another distinct statutory bar to the FCA, prohibiting actions "*based upon allegations or transactions which are the subject of* a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." §3730(e)(3) (emphasis supplied). Only in the unique text of the bar for parasitic *qui tam* actions codified at §3730(e)(4) did Congress choose the relator's reliance upon a *public disclosure of the allegations or transactions* in a specified forum to be the trigger of the statute.

3. Given the plain language of the FCA and the clear legislative purpose behind the 1986 amendments, that Dr. Haight in this case did not derive her knowledge of the falsity of defendants' statements from the disclosure of the NIH grant application should foreclose application of the bar. Because the *qui tam* action was "based upon" relator's independent investigation, and not on the disclosure of the grant, in no way does it qualifies as parasitic.

Under the law of some circuits, these undisputed facts would preclude invocation of §3730(e)(4). In *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), the Fourth Circuit held that a relator's action is "based upon" a public disclosure if the relator derived her knowledge of the allegations in that disclosure. Judge Luttig concluded that interpreting "'based upon' as meaning 'derived from' is the only

fair construction of the statutory phrase." 21 F.2d at 1348. That interpretation gives "plain meaning" to the terms chosen by Congress, and is "fully consistent with section 3730(e)(4)'s indisputed objective of preventing 'parasitic' actions." *Id.* (citing *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991)).

Although the *Siller* interpretation of the phrase "based upon" squares with the plain meaning of the words chosen by Congress and is consistent with the historical underpinnings of the public-disclosure provision, it is the minority view. The Seventh Circuit also joins in that interpretation. *See United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) ("The Fourth Circuit's interpretation of 'based upon' is the better on the grounds both of plain meaning and public policy"). Even in the circuits which adhere to a different view, courts recognize the great weight behind the argument of the minority. *See Minnesota Ass'n of Nurse Anesthetists v. Allina*, 276 F.3d 1032, 1044-1046 (8th Cir. 2002). Moreover, the minority's interpretation of "based upon" has drawn support from separate opinions in panels adopting the majority rule. *See United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335-36 (6th Cir. 1998) (Gilman, J., concurring); *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376, 394-402 (3rd Cir. 1999) (Becker, C.J., dissenting).

In the Ninth Circuit, prior precedent holds the statutory inquiry of §3730(e)(4) does not turn on whether the relator derived information from the public disclosure, or was even then aware of it. *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr., University*, 161 F.3d 533, 538-40 (9th Cir. 1998). It adheres to the majority view, which declares an action "based upon" a public disclosure so long as the allegations or transactions set forth in a prior disclosure are "substantially similar" to the allegations in the complaint. *See Allina*, 276 F.2d

at 1044-47; *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996).

When this case was before the Ninth Circuit, the question of whether relators derived knowledge of the allegations of fraud from the public disclosure was not considered. Instead, by stating the circuit's "two-step inquiry" under prior precedent (App. 8), the Ninth Circuit held that the bar would be invoked and the "original source" exception inquired into whenever "the allegations were publicly disclosed via a source enumerated in §3730(e)(4)(A)." Constrained by its prior rulings, the Ninth Circuit made this inquiry under the FCA bar without regard to whether the relator derived knowledge of the allegations from the disclosure itself.

REASONS FOR GRANTING THE CROSS-PETITION

In the event that a writ of certiorari is granted to the petitioners on the issue of whether there was a public disclosure in one of the specified fora of §3730(e)(4)(A), this Court should also resolve competing views on the meaning of the terms "based upon" in the FCA bar. In the Ninth Circuit, the court found the statutory prohibition of parasitic lawsuits was not invoked because production of the NIH grant application was not a public disclosure in a statutorily-delineated forum. If this Court were to grant a writ and *affirm* the Ninth Circuit's opinion, it would not need to reach the question of whether the Ninth Circuit law on "based upon" is correct. Whether under the majority or minority view, the bar would be foreclosed.

If the Court were to grant a writ and *reverse* the Ninth Circuit on whether there was a public disclosure under the FCA, however, relators would be required to go back to the Ninth Circuit for a determination of remaining issues. On the meaning of "based upon," relators would lose due to Ninth Circuit precedent. In that circumstance, relators would need file for

another writ, seeking determination of the same statutory provisions involving the same facts. Since the Ninth Circuit's view of "based upon" is already a part of the holding below, the issue is properly presented for determination by this Court, should it determine to grant a writ of certiorari on the public disclosure issue raised in the petition.

In addition, were the Court to grant review on the question presented by petitioner, it may find it necessary to interpret the statutory bar as a whole, including the meaning and purposes of the provisions and their peculiar legislative history. Rather than remanding to the Ninth Circuit for further consideration of an issue it has already decided, the Court would then most likely reach the question of what Congress intended when it used the terms "based upon." If relators are correct on the law, and reliance upon the disclosure is required, the Court's resolution of whether the FCA bar was invoked in this case would include a construction of the terms "based upon." Under these circumstances, the additional question presented would naturally be included in the resolution of petitioner's question, in the event that a writ is granted thereon.

CONCLUSION

If the Court grants the connected petition for a writ of certiorari, the conditional cross-petition should be granted.

Respectfully submitted,

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